

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Signed

77-6021

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

SALVATORE CIRAMI AND MARGARET CIRAMI,

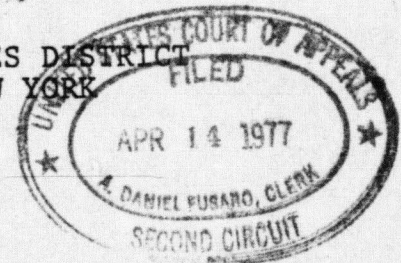
Defendants-Appellants

JAMES CIRAMI, MASPETH FEDERAL SAVINGS AND LOAN ASSOCIATION,
NANCY CIRAMI, DIGGS MANAGEMENT CORP., JACOB ZELIGFELD,
PRUDENTIAL INSURANCE COMPANY OF AMERICA, ANGELA CIRAMI
and ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Defendants

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE



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JAMES CIRAMI, MASPETH FEDERAL SAVINGS AND LOAN ASSOCIATION,
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PRUDENTIAL INSURANCE COMPANY OF AMERICA, ANGELA CIRAMI
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Defendants

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court correctly denied a second motion filed by taxpayers under Rule 60(b)(6), Federal Rules of Civil Procedure, to vacate the judgment, which had been entered against them after their original counsel had failed to oppose the Government's motion for summary judgment, where this Court had previously (1) affirmed the District Court's denial of taxpayers' first motion under Rule 60(b)(6) to vacate the same judgment since they had failed to provide any explanation for their original counsel's handling of the case and (2) refused taxpayers' request

that the case be remanded to permit them to develop further evidence on this point.

2. Whether the taxpayers are entitled to relief from this Court's prior decision and to have the case remanded to the District Court to consider the additional information they now seek to present.

STATEMENT OF THE CASE

Salvatore Cirami (Salvatore) and Margaret Cirami (Margaret) (herein at times also referred to as taxpayers) bring this appeal from an order of the United States District Court for the Eastern District of New York (Judge Platt) denying their second motion under Rule 60(b)(6), Federal Rules of Civil Procedure, to vacate a final judgment entered on June 12, 1974, against them in favor of the Government. The order appealed from was filed on December 27, 1976. (R. A-261 - A-264.)^{1/} Taxpayers filed their notice of appeal on January 21, 1977. (Docket Entries; R. A-263 - A-264.) Jurisdiction is conferred upon this Court by 28 U.S.C., Section-1291.

The relevant facts of this case, as established in the record may be summarized as follows:

This action was commenced on February 28, 1973, by the United States, pursuant to Section 7401 of the Internal Revenue Code of 1954 (26 U.S.C.), to reduce to judgment certain federal income tax assessments against taxpayers, to set aside as fraudulent a

^{1/} "R." references are to the separately bound record appendix.

conveyance of certain real property to their son, James Cirami (James), to foreclose federal tax liens against such real property, and to obtain a personal judgment against James for the proceeds of a mortgage he executed upon such real property. (R. A-2, A-49 - A-55.) By their answer, filed on March 20, 1973, through their then attorney, Peter R. Newman (hereinafter Newman), taxpayers and James denied the essential grounds for relief as alleged in the complaint. (R. A-2, A-57 - A. 58.)^{2/}

On December 28, 1973, the United States filed a motion for partial summary judgment to reduce to judgment the tax assessments outstanding against taxpayers for their taxable years ended December 31, 1961, 1962 and 1963.^{3/} By its memorandum and order of March 18, 1974, the District Court granted the Government's motion for partial summary judgment, "There being no opposition * * *:" (R. A-72 - A-73.) A final judgment was entered against Salvatore and Margaret in the total amount of \$270,792.43 on June 12, 1974.^{4/}

^{2/} In addition, taxpayers asserted a counterclaim against the United States for refund of income taxes allegedly erroneously collected. (R. A-57 - A-58.) Upon motion of the United States (Motion of May 17, 1973), the District Court dismissed this counterclaim (Order of October 2, 1973).

^{3/} Then husband and wife, Salvatore and Margaret filed joint returns for the years in issue. (R. A-6, A-12 - A-13, A-19 - A-20.)

^{4/} In addition, this judgment stated "it being expressly determined that there is no just reason for delay it is * * * ORDERED, ADJUDGED AND DECREED that said final judgment against defendants Salvatore and Margaret Cirami be entered forthwith." (R. A-74 - A-75.)

On or about August 28, 1974, Newman was replaced as counsel for taxpayers by Carl N. Mione (Mione) with whom Salvatore had been acquainted for at least one year prior thereto. (R. A-159 - A-160; see also United States Memorandum in Opposition to Taxpayers' Motion to Vacate Summary Judgment entered June 12, 1974 (hereinafter Memorandum in Opposition), pp. 1-2.)^{5/} On October 4, 1974, counsel for the Government, William R. Morrow, Jr. (Morrow), was informed by the law firm of Wagman, Cannon & Musoff, P.C. (Musoff) that Musoff was then representing Margaret and James and that Mione was representing Salvatore. (R. A-160; Memorandum in Opposition, p. 2.) Musoff filed an entry of appearance on December 23, 1974. (R. A-76.)

On May 1, 1975, taxpayers filed a joint motion pursuant to Rule 60(b)(6), Federal Rules of Civil Procedure, to vacate the judgment entered against them on June 12, 1974. (R. A-3, A-77 - A-78, A-160.) Attached thereto was Salvatore's affidavit wherein he asserted his lack of knowledge of the summary judgment against his former wife and him. (R. A-81, A-160.) At the hearing on the motion on May 27, 1975, the District Court gave them an opportunity to submit documentary evidence to support their motion. (R. A-5, A-255.) The only information submitted by the taxpayers related to the merits of their tax claim. (A-160.) By its memorandum and

^{5/} The facts set forth in the memorandum in opposition were attested to by counsel for the Government, William R. Morrow, Jr., upon his personal knowledge, in an affidavit filed with the memorandum in opposition. (R. A-85.)

order of October 6, 1975, the District Court denied taxpayers' motion to vacate the judgment. The District Court found that taxpayers had not shown the requisite "exceptional circumstances" for relief under Rule 60(b)(6), that their motion had not been made within a reasonable time as required by the rule, and that taxpayers had not shown a meritorious defense to the Commissioner's assessments. (R. A-149 - A-152.)

On taxpayers' appeal, this Court affirmed the order denying their motion to vacate the judgment. United States v. Cirami, 535 F. 2d 736 (1976). (R. A-156 - A-169.) In its opinion this Court noted that the only circumstances relied upon by the appellants in support of their motion was the fact that Newman had permitted the United States to take summary judgment for more than \$270,000 by default for unknown reasons. (R. A-163 - A-163.) This Court further observed (1) that taxpayers had failed to obtain an affidavit from Newman that would cast any light on the circumstances of his failure to contest the Government's motion for summary judgment and had failed to indicate any efforts to elicit Newman's testimony, either voluntarily or under subpoena, and (2) that there was no indication of what efforts were made by Salvatore--"an experienced businessman and no stranger to the activities of the Internal Revenue Service"--to contact Newman concerning the case. (R. A-163.) Accordingly, this Court held that taxpayers had shown no "exceptional circumstances" warranting relief under Rule 60(b)(6), Federal Rules of Civil Procedure, and

had failed to create by affidavit any questions of fact requiring a remand for further proceedings. (R. A-163, A-167 - A-168.) On petition for rehearing dated May 20, 1976, taxpayers urged this Court to remand the case for an evidentiary hearing so that Newman could be compelled to testify with respect to his action in the case. (R. A-170 - A-175.) On June 1, 1976, this Court denied their petition for rehearing. (R. A-176.)

On or about July 28, 1976, taxpayers filed their second motion pursuant to Rule 60(b)(6), Federal Rules of Civil Procedure, to vacate the judgment entered against them on June 12, 1974. (R. A-177.) Attached thereto were affidavits of Salvatore, Newman, taxpayers' accountant and their current counsel and a memorandum from the Department of Justice files. (R. A-188 - A-207.) The facts asserted in the material attached to the second motion to vacate the judgment indicated that the District Court's law secretary had called Newman's office on March 18, 1974, to determine why taxpayers were in default, but spoke only with Newman's secretary (R. A-188), that Musoff or another of Salvatore's attorneys had unsuccessfully attempted to reach Newman between November, 1974, and January, 1975, and that Musoff had finally been able to meet with Newman shortly after this Court handed down its decision with respect to their first motion under Rule 60(b)(6) (R. A-191 - A-192). Salvatore's accountant attested that he had inquired a number of times of Newman for Salvatore about the case, had been told by Newman that everything was being

taken care of, and had relayed such messages to Salvatore. (R. A-200 - A-201.) Newman attested that he was undergoing psychoanalysis during 1972 and 1973 for a psychiatric disorder that manifested itself in his inability to complete work and for that reason failed to answer the Government's motion for summary judgment. (R. A-203.) A letter from Dr. Henry H. Reiter, Executive Director of the East Hills Consultation Center, stated that Newman had been treated there from October 2, 1969, through September 23, 1971. (R. A-206.) Finally Salvatore attested that he had relied upon his accountant's statements relaying assurance about the case from Newman. (R. A-189 - A-190.)

The Government opposed the taxpayers' second motion to vacate the judgment on the grounds (1) that negligent conduct on the part of counsel is not a basis for relief under Rule 60(b)(6), Federal Rules of Civil Procedure; (2) that the doctrine of the "law of the case" precluded further proceedings herein; (3) that the taxpayers' motion for relief was untimely; and (4) that the facts did not support taxpayers' reason for the second motion to vacate because the Government's motion for partial summary judgment, the granting of that motion, and the entry of final judgment based thereon all occurred after the attested periods of Newman's asserted mental disorder and the treatment thereof. (R. A-236 - A-244.) Attached to the Government's opposition was an affidavit of the attorney who handled the case for the Government prior to November 17, 1975, and who stated therein that Newman had told

him of his own difficulty in obtaining information concerning the case from the taxpayers and that Newman was still engaged in the practice of law after he terminated his duties as counsel in this case. (R. A-245 - A-259.)

On December 27, 1976, the District Court entered an order denying the taxpayers' second motion to vacate on the ground that it was precluded from considering such motion in light of this Court's affirmance of the order denying taxpayers' first motion to vacate the judgment. (R. A-261 - A-262.) From this adverse order, taxpayers bring this appeal. (R. A-263 - A-264.)

SUMMARY OF ARGUMENT

Taxpayers again seek relief from a judgment entered against them on June 12, 1974. On May 1, 1975, they filed their first motion, pursuant to Rule 60(b)(6), Federal Rules of Civil Procedure, seeking relief from that judgment. The District Court denied that motion on October 6, 1975, and its order denying the motion was affirmed by this Court in United States v. Cirami, 535 F. 2d 736, on May 10, 1976. This Court noted that the only exceptional circumstances suggested by taxpayers for such relief was that their original counsel had permitted the entry of the default judgment for unknown reasons. Taxpayers presented no facts (1) as to why they had failed to elicit information from their then lawyer for his action in the case or (2) as to what efforts they had made with respect to the case. The Court further noted that nothing had been presented requiring any further proceedings, and it thereafter denied taxpayers' petition for rehearing wherein they had requested a remand for further evidentiary proceedings with respect to the conduct of their original counsel in the case. Shortly after this Court's opinion was filed, taxpayers began to obtain affidavits from their then lawyer and others explaining the reasons for his actions in the case and the efforts they had made with respect to the case. At the end of July, 1976, notwithstanding this Court's refusal to grant a requested remand, taxpayers filed a second Rule 60(b)(6) motion to vacate, premised upon the asserted illness of their

original attorney. The District Court denied the motion on the ground that this Court's action with respect to their first motion precluded further consideration in the District Court.

The only issue decided by the District Court was whether it had the power to entertain taxpayers' second Rule 60(b)(6) motion, which in essence requested the District Court to do through such motion the very thing which this Court had refused to do after its affirmance of taxpayers' first Rule 60(b)(6) motion. The District Court correctly denied the taxpayers' second motion. It is well settled that a District Court must proceed in accordance with the mandate and such law of the case as has been established by the appellate court. Since this Court concluded that taxpayers had failed to present anything in support of their first motion which would warrant further proceedings and had denied taxpayers' subsequent request for a remand to allow them to present further evidence concerning Newman's conduct in this case, the trial court was precluded from considering the additional evidence thereafter presented by them.

The only remaining question is whether this Court should now reconsider its prior decision, and permit the taxpayers to present evidence concerning Newman's conduct in this case. There is, we submit, no reason to do so. One of the requirements for relief from a judgment under Rule 60(b)(6) is that the motion be made within a reasonable time period. This motion is hardly timely. The facts they now proffer relate to events that

occurred prior to the entry of the June 12, 1974, judgment. Taxpayers have failed to show why such facts could not have been presented to this Court on their first motion, and there is simply no reason warranting this piecemeal presentation of their case.

Further, in its prior opinion, this Court made several observations that are crucial here. It noted (1) that relief from a judgment because of the error of counsel would normally fall within the scope of Rule 60(b)(1), which allows relief in the case of mistake or excusable neglect; (2) that Rule 60(b)(1) and (b)(6) are mutually exclusive so that any conduct falling under the former cannot stand as a ground for relief under the latter; and (3) that a movant must show exceptional circumstances apart from negligence or even gross negligence of counsel to warrant relief under Rule 60(b)(6). Moreover, in Costa v. Chapkines, 316 F. 2d 541 (1963), this Court specifically held that where a party seeks relief from a judgment on the ground that the serious illness of his attorney prevented the presentation of his case, such motion falls only within the scope of Rule 60(b)(1), and, thus, that the requested relief could not be granted unless the motion was filed within the time limits prescribed for Rule 60(b)(1). Inasmuch as the taxpayers' request for relief from the judgment is premised upon illness of their attorney, inasmuch as this Court has specifically held that illness of an attorney as a basis for relief falls within Rule 60(b)(1), inasmuch as a motion under Rule 60(b)(1) must be made not later

than one year from the entry of the judgment sought to be vacated and inasmuch as taxpayers' second Rule 60(b) motion was made over two years after the judgment, it is clear that taxpayers' second Rule 60(b) motion is untimely in any event, even assuming taxpayers would otherwise be entitled to prosecute their claim for relief in such a piecemeal fashion.

Taxpayers' attempt to bring their case within this Court's decision in Vindigni v. Meyer, 441 F. 2d 376 (1971), is also misconceived. There, this Court had held relief from a judgment to be possible under Rule 60(b) where a plaintiff's attorney had disappeared, the plaintiff had by affidavit asserted his diligence in attempting to find his attorney, and the defendant's attorney was aware of the disappearance of the plaintiff's attorney and yet still served him rather than his client. The Court did not indicate whether the asserted grounds fell within Rule 60(b)(1) or (b)(6). Moreover, that case is completely distinguishable from the instant case where the taxpayers' attorney did not disappear and was still practicing law after the entry of the judgment here, and the Government was unaware of any disability on the part of taxpayers' attorney.

Finally, the facts alleged in taxpayers' second Rule 60(b)(6) motion show that the illness of their attorney and the treatment therefore occurred prior to Government's motion for partial summary judgment and the granting thereof. In sum, the taxpayers

have failed to present any reason why this Court should depart from its prior decision on their first Rule 60(b)(6) motion, denying taxpayer's request for a remand for an evidentiary hearing as to their counsel's conduct in the entry of the judgment of June 12, 1974. The order denying their second Rule 60(b)(6) motion should be affirmed.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY CONCLUDED THAT IT LACKED POWER WITHOUT PERMISSION OF THIS COURT TO CONSIDER TAXPAYERS' SECOND MOTION TO VACATE THE JUDGMENT OF JUNE 12, 1974 PURSUANT TO RULE 60(b)(6), FEDERAL RULES OF APPELLATE PROCEDURE

On March 18, 1974, the District Court, noting the lack of any opposition, granted the Government's motion for partial summary judgment with respect to tax assessments outstanding against taxpayers for their 1961, 1962 and 1963 tax years. Final judgment with respect thereto was entered on June 12, 1974. Thereafter, taxpayers obtained new counsel, and on May 1, 1975, they filed a motion pursuant to Rule 60(b)(6), Federal Rules of Civil Procedure, Appendix, infra, to vacate the judgment entered for the Government on June 12, 1974, citing as grounds therefore the facts that the documentary evidence presented with such motion established a factual issue as to whether they owed the assessed taxes and that their counsel had failed to oppose the entry of such judgment for reasons unknown to them. Taxpayers not only submitted no facts as to the reasons for the actions of their original counsel, but failed to explain what efforts, if any, had been made to elicit such information from Newman and what efforts the taxpayers had made to ascertain the status of the case. The District Court denied their motion to vacate the judgment (R. A-149 - A-152) and this Court affirmed in United States v. Cirami, 535 F. 2d 736 (1976) (R. A-156 -

A-169), concluding that the taxpayers had failed to present a sufficient basis for further evidentiary proceedings.

During the period that taxpayers' petition for rehearing was pending before this Court (R. A-176 - A-192), taxpayers' counsel contacted Newman and otherwise began to gather information to fill the lacuna of facts respecting the first motion to vacate. Although this Court denied taxpayers' petition for rehearing (wherein taxpayers had specifically asked for a remand of the case for an evidentiary hearing as to the reasons for Newman's course of conduct) (R. A-175 - A-176), taxpayers, on or about July 28, 1975, filed a second motion pursuant to Rule 60(b)(6), Federal Rules of Civil Procedure, to vacate the judgment entered for the Government on June 12, 1974, and sought to provide an evidentiary basis found lacking by this Court in their first motion to vacate--namely, that their then counsel had permitted the entry of summary judgment because of an alleged mental disorder.

The only issue decided by the District Court was whether it had the power to entertain this motion in view of this Court's action with respect to the taxpayers' first motion to vacate. We submit that the District Court correctly held that it was without power to entertain taxpayers' second motion to vacate.

The law appears to be well settled that a District Court must proceed in accordance with the mandate and such law of the case as has been established by the appellate court. In re Potts, 166 U.S. 263 (1897); Winters v. Miller, 517 F. 2d 1337 (C.A. 2, 1975); United States v. Fernandez, 506 F. 2d 1200 (C.A. 2, 1974). And the law of the case precludes the trial court from considering newly discovered evidence. In re Potts, supra, p. 267; United States v. Fernandez, supra, pp. 1202-1203. The taxpayers, through their second motion to vacate, have asked the District Court to conduct the evidentiary hearing for which this Court had specifically refused a remand in the first appeal.

Taxpayers attempt to avoid the law of the case doctrine and to distinguish Fernandez on the ground that, here, this Court simply affirmed the District Court's order denying the first motion to vacate without specific instructions on how to proceed, whereas Fernandez was remanded with specific instructions. This distinction is without merit. When this Court refused taxpayers' request for a further opportunity in the trial court to develop additional facts with respect to their former attorney's conduct in this case, this Court effectively told the District Court not to consider additional evidence. Estate of Whitlock v. Commissioner, 547 F. 2d 506 (C.A. 10, 1976). Thus, the lower court properly declined to consider this newly proffered basis for relief under Rule 60(b)(6).

II

TAXPAYERS HAVE PRESENTED NO REASON FOR THIS COURT TO DEPART FROM ITS PRIOR DECISION AND TO REMAND THE CASE TO THE DISTRICT COURT FOR AN EVIDENTIARY HEARING ON THEIR SECOND MOTION TO VACATE THE JUDGMENT HEREIN

As in their prior appeal (United States v. Ciriame, supra), taxpayers seek relief under Rule 60(b)(6), Federal Rules of Civil Procedure, from the judgment of June 12, 1974, on the basis of their original counsel's conduct in allowing the judgment to be entered. Just recently, this Court in Grant Co. v. Commissioner, 77-1 U.S.T.C., par. 9200, p. 86,334 (Feb. 3, 1977), opined that "Once a rule of law has been established for a case we will not depart therefrom on a subsequent appeal unless special circumstances of the case warrant a reopening of issues previously decided." We submit that taxpayers have presented no such "special circumstances" warranting this Court to alter its prior action in this case and to allow the taxpayers to present additional evidence in support of their Rule 60(b)(6) motion.

Rule 60(b), Federal Rules of Civil Procedure, provides that, upon motion, a party may be relieved from a final judgment, for (1) mistake, inadvertance, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial; (3) fraud or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied; or (6) any other reason justifying relief. The rule further provides that any

such motion must be made within a reasonable time, and, for reasons (1), (2), and (3) above, not more than one year after the entry of the judgment.

In order for a motion for relief to be granted under Rule 60(b), it is generally recognized that the moving party must show three things. First, he must show that there is a basis under the rule for granting the requested relief. Rinieri v. News Syndicate Co., 385 F. 2d 818 (C.A. 2, 1967). Second, he must show that the motion has been brought within the requisite time period. Radack v. Norwegian America Line Agency, Inc., 318 F. 2d 538 (C.A. 2, 1963); Schildhaus v. Moe, 335 F. 2d 529 (C.A. 2, 1964). Third, he must show a meritorious claim or defense; that is, the moving party "must show facts which, if established, might reasonably be said to be a basis for recovery." Beshear v. Weinzapfel, 474 F. 2d 127, 132 (C.A. 7, 1973).

Rule 60(b)(6), the "other reason" clause, is a residual clause, encompassing all of those reasons justifying relief other than those set forth in clauses (1) through (5). Klapprott v. United States, 335 U.S. 601 (1949), modified, 336 U.S. 942 (1949). However, its scope is "extremely meagre" (United States v. Karahalias, 205 F. 2d 331, 333 (C.A. 2, 1953)), and relief under this clause requires a showing of "exception circumstances" (United States v. Cirmi, supra, pp. 738-739, 741; Rinieri v. News Syndicate Co., supra, p. 822). Moreover, while there is no specific time period within which the motion must be made under Rule 60(b)(6), the rule does require that any such motion be made

within a reasonable time. The movant must show a justifiable reason for delay. Rinieri v. News Syndicate Co., supra. Unexplained delays (Schildhaus v. Moe, supra; Westerly Electronics Corp. v. Walter Kidde & Co., 367 F. 2d 269 (C.A. 2, 1966)) or frivolous reasons for delay (Standard Newspaper, Inc. v. King, 375 F. 2d 115 (C.A. 2, 1967)) are sufficient to deny the motion.

In United States v. Cirami, supra, pp. 739-740, this Court opined that error or negligence of counsel might constitute a basis for Rule 60(b) relief only under Rule 60(b)(1) "on the theory that counsel's error constitutes a mistake or excusable neglect" and recognized that this Court "has rather consistently refused to relieve a client of the burdens of a final judgment entered against him due to the mistake or omission of his attorney by reason of latter's ignorance of the law or of the rules of the court, or his inability to efficiently manage his caseload. United States v. Erdoss, 440 F. 2d 1221 (2d Cir.), cert. denied, 404 U.S. 849, * * * (1971); Schwarz v. United States, supra [384 F. 2d 833, 835 (2d Cir., 1967)]; Dal International Trading Co. v. Sword Line, Inc., 286 F. 2d 523 (2d Cir., 1961); Benton v. Vinson, Elkins, Weems & Searls, 255 F. 2d 299 (2d Cir.), cert. denied, 358 U.S. 855, * * * (1958)." Further, in Costa v. Chapkines, 316 F. 2d 541, 542 (1963), this Court held that where a party seeks relief from a judgment under Rule 60(b) on the basis that the failure to prosecute his case was due to the serious illness of the attorney, such "motion must be read as coming

clearly within subdivision (1) of Rule 60(b), Fed. R. Civ. Pro., providing for relief from judgment in cases of "[M]istake, inadvertence, surprise, or excusable neglect." Since the provisions of Rule 60(b)(1) and (b)(6) are mutually exclusive, the court there ruled that such a motion, premised on the illness of counsel, could not be granted unless filed within the time specified for Rule 60(b)(1) motions. 316 F. 2d, p. 542.

This Court also concluded in taxpayers' initial appeal that this case was distinguishable from Vindigni v. Meyer, 441 F. 2d 376 (1971), in which this Court had held relief to be possible under Rule 60(b) (without specifying which subsection thereof) where the plaintiff's attorney had disappeared, where the plaintiff in his affidavit asserted his diligence to find his attorney, and where the defendant's attorney was fully aware that the plaintiff's attorney had disappeared when the case was dismissed. In that case, it remanded for a full evidentiary hearing to determine whether the plaintiff had in fact neglected his suit.

Finally, in the first appeal, this Court recognized that in L. P. Steuart, Inc. v. Matthews, 329 F. 2d 234 (C.A.D.C., 1964), cert. denied, 379 U.S. 824 (1964), a divided court had held that grossly negligent conduct of counsel may be a basis for relief under Rule 60(b)(6). In that case, the former counsel had by affidavit stated that he had been beset by personal

problems, including the death of his parents and the serious illness of his wife, and that his client had attested to his numerous inquiries of that counsel and of that counsel's assurance that the case was proceeding. While this Court found that the taxpayers here had failed to present any evidence bringing their cases within L. P. Steuart, Inc., it noted that it was not inclined to follow the reasoning of that case in any event.

Essentially, the position of taxpayers on this appeal is (1) that the court erred in denying their request for remand of the case to develop facts concerning their then counsel's role and their actions in the case; (2) that they should be allowed a second chance to develop these facts through a second motion to vacate under Rule 60(b)(6); and (3) that this Court need not embrace the rationale of L. P. Steuart, Inc., because the additional proffered facts bring their case within Vindigni.

But even assuming for the purpose of argument that the facts in the various affidavits attached to taxpayers' second Rule 60(b)(6) motion would bring their case within Vindigni, taxpayers have given no reason why such information could not have been presented on their first motion to vacate under Rule 60(b)(6), as the Court held it should have been in its original opinion. Although taxpayers' counsel were able to contact Newman within 17 days following this Court's first decision, they have not given a full explanation as to why they were unable to contact him during the pendency of taxpayers' first motion in the District Court at

any time between May and October, 1975. Indeed, the District Court gave them additional time to submit further documentary evidence after the hearing on their first motion to vacate. (R. A-255.) Yet, none of this information relating to Newman and the taxpayers' diligence, or lack thereof, in contacting Newman was submitted to the District Court during the first motion. Moreover, the affidavits of Musoff, Gordon, and Kipper (R. A-192, A-195) indicate only that they unsuccessfully attempted to contact Newman between November, 1974, and January, 1975. Yet, as pointed out above, their first motion to vacate was not filed until May, 1975. Thus, taxpayers have presented little or no justification for allowing them to present their motion to vacate in piecemeal fashion and have presented "no reason for according them another chance on this issue." (Philipp Brothers Chemicals, Inc. (N.Y.) v. Commissioner, 435 F. 2d 53, 59 (C.A. 2, 1970). In sum, their second Rule 60(b)(6) motion has not been presented within a reasonable time as that rule requires.^{6/}

In addition, taxpayers have failed to bring their case within Vindigni even assuming the action there was grounded on Rule 60(b)(6), a matter not brought out in the opinion therein. Therein, at the outset the party moving to vacate a prior

^{6/} In both Vindigni and L. P. Steuart, Inc., the parties had filed with their Rule 60(b) motions affidavits presenting facts to support the theory upon which they relied.

judgment under Rule 60(b) filed an affidavit stating that he had diligently sought to determine the status of his suit. Herein, such affidavit by taxpayers was not filed until their second motion to vacate. In that case, the plaintiff's attorney had disappeared and had evidently ceased to practice law. Further the defendant's lawyer in that case was aware that the plaintiff's lawyer had disappeared and, as the Court specifically ruled (441 F. 2d, p. 378), had taken unfair advantage of the plaintiff by not notifying him. None of these rather extraordinary facts are here present. We do not understand taxpayers to complain that the Government has taken unfair advantage of them or that their lawyer had disappeared.^{7/} Rather, their entire defense rest upon Newman's inability to handle his cases because of an alleged mental disturbance. Curiously, however, the various papers submitted by taxpayers indicate a discrepancy as to when Newman was

^{7/} In their brief, taxpayers assert (p. 4) that the Government's files contain information supporting their view that Newman was impossible to contact. In point of fact however, that memorandum (R. A-188) merely indicates that, on one occasion, the District Court judge's law secretary had called Newman's office regarding his failure to oppose the Government's motion, and that he had spoken to Newman's secretary at that time. It hardly indicates that Newman was holding himself "incommunicado" as to everyone. Indeed, the Government's trial attorney attested that he had been able to contact Newman, and that Newman had complained of his own inability to obtain information from taxpayers. (R. A-245 - A-251.) Moreover, it is at least somewhat curious that the accountant, De Stefano, apparently never experienced any difficulty in contacting Newman. (R. A-197 - A. 202.)

undergoing psychoanalysis for a psychiatric disorder--Newman giving the dates as 1972 and 1973, while the institution where such treatment was provided giving the dates of October 2, 1969 through September 23, 1971. Yet the Government's motion for partial summary judgment was filed on December 28, 1973, was granted on March 18, 1974, and final judgment thereon was entered on June 12, 1974--all dates being after the time that Newman was allegedly suffering a mental disturbance and under-^{8/}going treatment therefor.

In any event, since the taxpayers are principally relying upon the illness of their attorney as their grounds for relief from the judgment of June 12, 1974, the case comes squarely within this Court's decision in Costa v. Chapkines, supra, wherein this Court held that a request for relief from a judgment based upon an attorney's illness comes squarely within subdivision of Rule 60(b)(1) and not Rule 60(b)(6) of the Federal Rules of Civil Procedure. Motions coming within Rule 60(b)(1) must be made within one year of the judgment. The instant motion was filed nearly 26 months after the entry of the judgment and, accordingly, is untimely even if it otherwise stated grounds for relief under that provision.^{9/}

^{8/} Indeed for this reason alone the case is distinguishable from L. P. Steuart, Inc. See United States v. Ciriame, supra, p. 741.

^{9/} Obviously, the fact that their first motion to vacate was timely, but wholly inadequate, furnishes no basis for granting relief on a subsequent untimely motion which belatedly attempts to remedy the inadequacy of the original motion.

Although the taxpayers claim that this Court need not embrace the rationale of L. P. Steuart, Inc., the underlying rationale of their position is that an attorney's gross neglect is not to be attributed to the client for purposes of Rule 60(b)(6) Federal Rules of Civil Procedure. As this Court noted, the contrary approach generally taken by this Circuit of attributing the acts of counsel to their clients is not only supported by, but is required by Link v. Wabash Railroad Co., 370 U.S. 626, 633 (1962). There the Court reasoned in upholding a dismissal of a case under Rule 41(b), Federal Rules of Civil Procedure, that "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent." (370 U.S., pp. 633-634.) Although that case concerned Rule 41(b) and the Court expressly reserved the question of relief under Rule 60(b) where there was a more adequate explanation of the absence of counsel, the Court's reasoning suggests that any relief under Rule 60(b) because of a client's attorney's action would have to come within the excusable neglect provisions of subsection (1). See 7 Moore's Federal Practice (2d ed.), par. 60.27[2], pp. 365-372. Cf. Costa v. Chapkines, supra. The contrary conclusion of L. P. Steuart, Inc. is thus erroneous and should not be followed.

^{10/} Vindingi is, as we have noted, clearly distinguishable. There a defendant's lawyer, aware of the plaintiff's lawyer's disappearance, took unfair advantage of the plaintiff by following the rule of serving papers upon a lawyer known to have disappeared. This aspect of Vindingi may well furnish the "extraordinary circumstances" not embraced by Rule 60(b)(1), which would warrant relief under Rule 60(b)(6).

Thus, even assuming that taxpayers have made a sufficient showing of "excusable neglect" under Rule 60(b)(1), and that they might otherwise properly pursue their request for relief under Rule 60(b) in such a piecemeal fashion, the time within which such a basis for obtaining relief might have been shown has long since expired.

In sum, the taxpayers have failed to present any reason why this Court should reconsider its prior opinion and action in this case, and, thus, no reason to remand this case for further consideration of their Rule 60(b) motion by the District Court.^{11/}

^{11/} In their conclusion (Br. 14-15), taxpayers also seek a remand for a trial on the merits. Obviously, however, there is no reason for such a trial unless, first, this Court decides to reconsider its earlier conclusion that taxpayers are not entitled to a further hearing on their Rule 60(b) motion and, then, the District Court, acting in its sound discretion on remand (see United States v. Cirami, *supra*, p. 739; R. A-163), concludes that they have established their entitlement to the relief requested.

CONCLUSION

For the reasons stated above the order of the District Court, should be affirmed.

Respectfully submitted,

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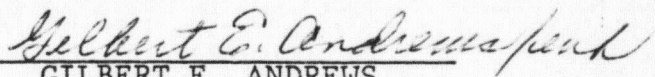
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APRIL, 1977.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereon on this 11th day of April, 1977, in an envelope with postage prepaid, properly addressed to them as follows:

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APPENDIX

Federal Rules of Civil Procedure:

Rule 60.

Relief From Judgment or Order

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(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.
On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. * * *.

